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Nos. 98 and 99

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

UNITED STATES OF AMERICA,
Petitioner,

v.

ERNESTINA G. FLEISCHMAN.

UNITED STATES OF AMERICA,
Petitioner,

v.

HELEN R. BRYAN.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

O. JOHN ROGGE,
BENEDICT WOLF,
Counsel for Respondents.

On the Brief:
ROBERT H. GOLDMAN,
MURRAY A. GORDON,
HERBERT J. FABRICANT.

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IN THE

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No. 98

UNITED STATES OF AMERICA,

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ERNESTINA G. FLEISCHMAN.

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HELEN R. BRYAN,

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

Opinions Below

The opinions of the Court of Appeals for the District of Columbia Circuit reversing the convictions of both respondents are reported (in No. 98) at 174 F. 2d 519 (F. R. 305) and (in No. 99) at 174 F. 2d 525 (B. R. 71), respectively.*

* The records in the *Fleischman* and *Bryan* cases will be cited herein as "F. R. ——" and "B. R. ——".

Jurisdiction

The petitions of the United States for writs of certiorari were granted on October 17, 1949. Jurisdiction is conferred by 28 U. S. C. 1254 (1) and reference is made to Rules 37(b)(2) and 45(a), F. R. Crim. P.

Question(s) Presented

The petitions of the United States tendered one question herein: "Whether the lack of a quorum of a Congressional Committee on the return of a subpoena to produce records constitutes a defense to a charge of wilful default, where objection to the production of the records is not made on that ground" (Brief for the United States, p. 2).

These causes, arising from the same circumstances which yielded *Barsky, et al.* v. *United States*, 167 F. 2d 241, *cert. den.* 334 U. S. 843 (Petition for Rehearing pending), are companions to the latter. The questions tendered in *Barsky* (and in appeals herein below) are still before this Court (see Petition in *Barsky, et al.* v. *United States*, No. 766, October Term, 1947).

Statutes Involved

1. 2 U. S. C. § 192; R. S. § 103, as amended June 27, 1938, c. 594, 52 Stat. 942.

> "*Refusal of witness to testify.* Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who,

having appeared, refused to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

2. H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15 (January 3, 1945).

"Resolved, That the rules of the Seventy-eighth Congress be, and they are hereby, adopted as the rules of the Seventy-ninth Congress.

That rule X of the Rules of the House of Representatives is amended by adding after clause 40a of the first paragraph a new clause to read as follows:

'40b. On Un-American Activities, to consist of nine members.'

Rule XI of the Rules of the House of Representatives is amended by adding after clause 40a two new clauses to read as follows:

'40b. To Un-American Activities—to the Committee on Un-American Activities.

'40c. The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

'The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

'For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the Committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.' ''

3. 18 U. S. C. § 3486; R. S. § 859, as amended June 22, 1938, c. 594, 52 Stat. 943.

''*Testimony before Congress; immunity*

No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.''

Counter-Statement

The indictments which charged the respondents herein are, in substance, the same as that in *Barsky, et al.* v. *United States* (*supra*). Respondents Fleischman and Bryan were tried separately.*

The indictments charged the respondents with a misdemeanor of personally committing a contempt of the Committee on Un-American Activities of the House of Repre-

* A more complete statement of facts is to be found in the Petition for Writ of Certiorari in *Barsky, et al.* v. *United States of America*, No. 766, October Term 1947, still pending in this Court.

sentatives of the 79th Congress (sometimes herein referred to as the "House Committee") on April 4, 1946. The allegations of each indictment proclaimed a violation of 2 U. S. C. 192.*

The indictments arose from an investigation of the Joint Anti-Fascist Refugee Committee ("JAFRC"), a licensed unincorporated relief association (B. J. A. 303-328, 540-3)** by the said House Committee.

The respondent Fleischman was a member of the Executive Board and respondent Bryan was employed as the Executive Secretary of JAFRC.

It appears that on December 4, 1945, the House Committee issued a document which by its terms commanded the Sergeant at Arms to summon the respondent Bryan or Dr. Edward Barsky, the Chairman of the JAFRC Executive Board, to testify before it on December 19th and to produce at that time "all books, records, papers and documents" concerning JAFRC receipts and disbursements "and all letters, memoranda or communications from, or with, any person or persons outside of the United States" (F. R. 108; see B. J. A. 221-222). Respondent Bryan was served with the aforesaid summons by a clerk of the House Committee on December 14 (B. J. A. 217, 22). On that day she and Dr. Barsky were instructed by a resolution adopted by unspecified and unnamed members of the Executive Board of the JAFRC to advise with counsel and to "take any additional steps necessary and pursue all means to maintain and protect the rights" of the JAFRC "from the unjustified attack" on the JAFRC by the House Committee "which we consider constitutes a threat to democratic procedure in the United States" (Gov. Ex. 9, F. R.

* The indictment (in the *Fleischman* case) also alleged a conspiracy in violation of 18 U. S. C. 88. Inasmuch as this count was dismissed no reference to this aspect of the indictment will be made hereinafter.

** The above citation is a reference to the Joint Appendix in *Barsky*.

241-2). The respondent Bryan appeared before the House Committee on or about January 24, 1946 but did not produce the summoned records (F. R. 109).

The following day a subpoena to Dr. Barsky was issued by Congressman Wood, as Chairman of the House Committee, to appear on January 30, 1946 to testify and to bring with him all records indicating all contributors to and disbursements by the JAFRC in 1944 and 1945, and all correspondence received and sent by the JAFRC from and to foreign countries (B. J. A. 223-225). This subpoena was served on January 28, 1946 and Dr. Barsky appeared on the adjourned date of February 13, 1946 (F. R. 109, B. J. A. 421-434). Two days prior to his appearance, five members of the Executive Board met* and a resolution was adopted** reiterating that the JAFRC cannot "be considered Un-American, subversive, or an attack upon the principles of our form of government" and instructing Dr. Barsky not to produce the summoned books and records (Gov. Ex. 10, F. R. 243-4). The respondent Fleischman was not present at that meeting and did not vote on the resolution; and the respondent Bryan, being only an employee, did not, of course, vote.

At the February 13th hearing before the House Committee, Dr. Barsky was questioned and testified but did not produce the summoned books and records (F. R. 109).

Thereafter the House Committee, on March 29, 1946, issued 16 individual mandates addressed to the "Sergeant at Arms", or his "Special Messenger", to summon 16 named persons to appear and testify before the House Committee on April 4, 1946 (F. R. 106-7, 140-1). The par-

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* Dr. Barsky, Dr. Jacob Auslander, Mrs. Ruth Leider, Manuel Magana, and Prof. Lyman R. Bradley (F. R. 243).

** The minutes of the meeting indicate that 7 other members of the Board voted in absentia; Howard Fast, Mrs. Marjorie Chodorov, Leverett Gleason, Harry M. Justiz, Mrs. Samuel Kamsly, Mrs. Charlotte Stern and Dr. Jesse Tolmach (F. R. 244).

ties to be summoned, including respondent Fleischman, comprised all the members of the JAFRC Executive Board except Dr. Barsky and John T. McManus; and the respondent Bryan. Each mandate, in terms, further instructed the Sergeant at Arms to bring with *him* all books and records of the JAFRC from January 1, 1945 to April 14, 1946 concerning JAFRC receipts and disbursements, and JAFRC correspondence with persons in foreign countries during that same period (F. R. 97, 140-1). Service was made on the respondent Fleischman on March 29, 1946 (F. R. 98), and on the same date the respondent Bryan was served with such a subpoena addressed to the JAFRC (B. R. 31-2A).

Ernestina Fleischman appeared on April 4, was sworn and testified, but she did not produce the records summoned (F. R. 123ff). None of the other witnesses produced those records (F. R. 110, 142). In explanation of her action, the respondent Fleischman submitted a statement which indicated that Helen Bryan as Executive Secretary of the JAFRC had custody and control of the documents sought and was responsible for the production or non-production thereof (F. R. 125).

Helen Bryan also appeared that day and refused to produce the books and records (F. R. 142). In a written statement which she sent to the Committee she informed the Committee that she considered that it had no constitutional right to the books and records and that the production thereof would publicize recipients of JAFRC funds and "put in jeopardy the lives of those members of their families who are at the mercy of the Franco dictatorship" (B. J. A. Gov. Ex. 6, pp. 103-105).

The foregoing action of respondents before the House Committee at the hearing of April 4, 1946 is the subject matter of the instant prosecution.

On March 31 of the next year, 1947, respondent Fleischman together with all the members of the JAFRC Execu-

tive Board except John T. McManus were indicted by the Grand Jury on two counts: for an alleged conspiracy; and for an alleged contempt, after having been cited by the House of Representatives for their alleged wilful and deliberate refusal to produce the aforementioned books and records. Respondent Bryan was indicted on the substantive count alone (B. R. 1-2).

At the outset of the *Fleischman* trial the conspiracy count of the indictment was dismissed in view of the determination upon the *Barsky* trial that there was no evidence to sustain the charge (F. R. 9, 287). Each respondent was convicted of the substantive charge, and was sentenced to imprisonment for three months and fined $500 (F. R. 7; B. R. 19).

At the trials, the prosecution attempted to show the presence of a quorum at the April 4 hearing (F. R. 144 ff; B. R. 47 ff) and respondents, on cross-examination and in their motions, requests, and objections, put in issue the presence of such a quorum. Upon appeal, respondents assigned as error the following Trial Court instruction to the jury in each case; "as a matter of law, that the Committee on Un-American Activities of the House of Representatives was a validly constituted committee of the Congress, and was at the time of the defendant's appearance" (F. R. 283; B. R. 59-60). In the *Fleischman* case, the Court also instructed the jury "that the members of the committee before whom the defendants appeared, pursuant to the subpoenas served on them, constituted a sufficient quorum to carry on the investigation" (F. R. 283). In the *Bryan* case, the Court advised counsel that it held as "a matter of law" that a quorum was present when the defendant appeared before the House Committee (B. R. 62).

The Court of Appeals for the District of Columbia, one Judge dissenting, reversed each judgment on the ground that the presence of a quorum of the House Committee at

the hearing of April 4 was a material question of fact in the alleged offense and should have been submitted to the jury.*

The United States of America, on June 3, 1949, petitioned for a writ of certiorari and said petition was granted October 17, 1949. The issue on which certiorari was granted, though of the utmost importance to the respondents and to the Government, is, nevertheless, peripheral. There are presently pending and there remain for decision in *Barsky* and by the same token in *Bryan* and *Fleischman* additional questions as the same are set forth and argued hereinafter.

Summary of Argument

A Congressional Committee, like any other agency of government, cannot be obstructed or impeded in its investigations unless it is in existence and organizationally capable of functioning. To impede such an agency of government does not depend on the means used; there is no distinction to be drawn between obstruction by perjury or obstruction by failure to produce documents. An agency of government incapable of being impeded by the former means cannot be impeded by the latter.

In a criminal case, the point of lack of quorum of a congressional committee which renders said committee organizationally incapable of being impeded, may be appropriately raised at the time of trial.

Because additional issues were presented to the United States Court of Appeals for the District of Columbia Circuit, and because the reversals of the judgments in these causes by that Court did not necessitate reaching said issues, they are argued herein.

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* Judge EDGERTON, the author of the majority opinion on the quorum question, further found that since no evidence was produced that respondent Fleischman had the power or ability to produce the records subpoenaed, the Trial Court erred in refusing to direct a verdict of acquittal in her case. PROCTOR and PRETTYMAN, *JJ.*, were of a contrary view on this point and so the Court of Appeals reversed on the instructions alone.

The substance of these causes was particularly related to the employment of some of the jurors. Said jurors, being employees of the Government and subject to Executive Order 9835 (popularly referred to as the "Loyalty Order"), should not have been permitted to sit as members of a jury called upon to pass judgment on persons charged with having committed a contempt of Congress. The United States was more than the nominal plaintiff in these prosecutions; in an adversary proceeding the employees of one party should not be permitted to sit on the jury.

18 U. S. C. 3486 specifically prohibits the use of testimony by witnesses before a Congressional Committee as evidence in subsequent prosecutions, except in a case of perjury. The testimony of the respondents was received in evidence, over objection, and in violation of said section.

The charge of the Trial Court in both causes on the meaning of the word "wilful" was error insofar as it obviated the obligation of the Government to prove a specific intent to commit the crime of contempt.

The issue of aiding and abetting, not charged in the indictments in these causes, should not have been submitted to the Jury. An aider cannot be guilty unless there is a principal who has committed the substantive crime. As the issue was left to the Jury, the respondent Fleischman may have been convicted for aiding and abetting, although there was no principal.

The rulings of the Trial Courts required compliance by each respondent who was served with an alleged subpoena and who "alone or in concert . . . had custody or control over" records. A subpoena *duces tecum* need be complied with only where actual custody is in the hands of the party served. A person subpoenaed need not "sue and labor" to obtain books and records not in his possession.

The Resolution establishing the House Committee is on its face and as applied unconstitutional.

POINT I

The instructions of the Trial Courts that, as a matter of law, a quorum of the House Committee was in attendance when respondents appeared, were error; the judgments of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

From the beginning the complaint of the United States of America has been that the two women who are respondents herein, criminally impeded and obstructed the activity of an agency of Government. The offensive conduct with which Ernestina G. Fleischman and Helen R. Bryan were charged was violation of that statute which deals with "Refusal Of Witnesses To Testify" before a Committee of Congress (2 U. S. C. 192). More specifically, the violation alleged was the wilful default by "a person . . . summoned as a witness . . . to produce papers" (2 U. S. C. 192) before the House Committee on Un-American Activities.

In our view, an agency of Government cannot thus or otherwise be thwarted and frustrated, if its existence and right to act as an agency of Government is not an established fact at the time of the offense. This Court in *Christoffel* v. *United States*, 338 U. S. 84, and the Court of Appeals for the District of Columbia Circuit as well (in these very causes), have affirmed this view.

The petitions of the United States for writs of certiorari and the brief in support thereof assail the decisions herein on two grounds. *First*, it is said that there is a distinction to be drawn between impeding and obstructing a Congressional Committee by means of false testimony and impeding and obstructing by means of refusal to produce papers; *second*, it is said that it is immaterial that the agency of Government allegedly thwarted was not in existence and not endowed with a right to act if the offending

parties did not assert these conditions as facts at the time of their offensive conduct.

Neither theory is correct. The first fails for lack of appreciation of the fact that impeding and obstructing an agency of Government does not depend upon the means used, but rather on the result. Non-disclosure of pertinent testimony or documents is not less offensive or contumacious than false testimony. Both are calculated to achieve the same result. In each case, however, the offending conduct will fail to achieve that result if, in fact, the agency of Government is either non-existent or organizationally incapable of being impeded at the time of the offense.

The second theory fails for lack of appreciation of the fact that "Witnesses in committee hearings cannot be required to be familiar with the complication of parliamentary practice [and] even if they are, the power to raise a point of no quorum appears to be limited to members of a committee" (*Christoffel* v. *United States*, 338 U. S. 84, 88). It is, therefore, apparent that in a criminal case affecting the rights of persons who are not members of the Congressional Committee, the occasion of trial was an appropriate one to point out the inherent disability of a multiple member agency to exist or act absent a quorum.

A.

The Rule Of *Christoffel* v. *United States*, 338 U. S. 84, Is Applicable Here.

PRETTYMAN, *J.*, dissenting herein below, and the United States of America, in its brief, take the view that the instant causes present no problem in any way analogous to the quorum question in perjury cases. The United States of America offers the rationale of the dissenting Justice in support of its present effort to distinguish *Christoffel* v. *United States* from the causes at bar. Thus, the dis-

sent below proclaimed that "There is no analogy. Perjury is an affirmative act. The accused must do something; he must testify falsely. . . . I see no analogy to the offense of failing to act." *Fleischman* v. *United States*, 174 F. 2d 519, 524. The United States, in its brief (p. 14), echoes this view as follows:

> "The essence of the offense charged was a *wilful failure to act* where a duty to act existed. While such failure to act may be proved, and was here proved, by evidence of certain positive acts, nevertheless the actual offense, unlike the offense of perjury, consists of something negative rather than affirmative—a failure to do that which an illegally imposed duty requires to be done".

This purported distinction, upon analysis, disappears.*

The crimes of contempt and perjury are analogous for each involves an obstruction of the inquiry at hand—of the search for truth. It is immaterial that the perjury which obstructs an inquiry is false testimony or non-disclosure of the truth. It is equally immaterial that the contempt which obstructs an inquiry arises from action or inaction. It is important in both instances only that the inquiry is thwarted.

Thus, this Court has heretofore observed that perjury is not only akin to but the equivalent of criminal contempt when it serves to obstruct a particular inquiry. *Ex parte Hudgings*, 249 U. S. 378. And in a case where the offender was "condemned for that she made use of false swearing . . .", CARDOZO, *J.*, writing for a unanimous Court, upheld

* Indeed, in the argument before this Court in *Christoffel* v. *United States* (in which the present counsel represented the petitioner) the Department of Justice, by Assistant Attorney General Campbell, in response to a question from Mr. Justice BLACK, stated that there was no distinction between the necessity for a quorum in perjury cases and the necessity for a quorum in contempt cases. Moreover, in the trial of the *Fleischman* case the Government apparently recognized no distinction because it assumed the burden of proving the presence of a quorum (see *Fleischman* v. *United States*, 174 F. 2d 519, 520 (footnote 5); F. R. 144; and see B. R. 47).

a conviction for criminal contempt and stated: "On the other hand obstruction to judicial power will not lose the quality of contempt though one of its aggravations be the commission of perjury". *Clark* v. *United States,* 289 U. S. 1, 12. In its decision in the latter case, this Court took the view that "what is punished is misconceived unless conceived of as a unit, the abuse of an official relation by concealment and deceit. This is contempt whatever it may be besides" (289 U. S. 1, 12).

The logic of the situation, as well, eliminates any distinction between the crimes of perjury and criminal contempt when considering the question of quorum. If a tribunal is not competent so as to support a charge of obstruction by perjury, it is not such a tribunal as may be obstructed in any other fashion. Thus, in a case where the indictment was for impeding and corrupting justice before a multiple member judicial tribunal, it was held that the indictment was insufficient for failure to *allege* a quorum of the court (*State of Vermont* v. *Freeman,* 15 Vt. 722).

"The orderly and efficient dispatch of Congressional business" depends, in the first instance, on fulfilling the Congressional requirements prerequisite to acting as an agency of Government. If a Congressional Committee is not empowered to meet or take action then the obstruction and impediment to any inquiry on which it is embarked flows from this inherent disability rather than from any action or inaction on the part of those summoned to appear before it.

The rule in respect to Committees of the House of Representatives is perfectly clear. The presence of a quorum must be affirmatively shown before the Committee has any status (VIII *Cannon's Precedents* 2222) and "no measure or recommendation [may] be reported from any such Committee unless a majority of the Committee were actually present" (Legislative Reorganization Ast of 1946, 60 Stat. 812 § 133(d)). Indeed, "The absence of a quorum of the

Committee, though at the time unobjected to", makes "effective action impossible" (*Christoffel* v. *United States*, 34 U. S. 84, 87; VIII Cannon's Precedents 2212). This being evident, it follows that an agency organizationally effective by these standards cannot be obstructed at all, whether by contempt or perjury.

If the House Committee, on the return day of the purported subpoenaes herein, was organizationally without power to receive documents, then it could not be deprived of information.* A refusal to produce documents before a House Committee which is not met and which is therefore unauthorized to receive them is no more contempt than a lie is perjury under similar conditions. Unless the Committee was in existence no compliance with the summons was possible. The question of whether the Committee was in existence, being vital, required a determination by the jury. In the Trial below this question was taken from the Jury and decided, as a matter of law against the respondent.**

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* In any event, in the instant cases, it was not deprived of any such record by the respondents. The purported subpoenaes allegedly dishonored read:

> "By authority of the House of Representatives of the Congress of the United States of America, to the *Sergeant-at-Arms* or his *special messenger*:
>
> *You* are hereby commanded to summons Mrs. Ernestina G. Fleischman . . . to be and appear before the un-American Activities Committee of the House of Representatives of the United States, of which the Honorable John S. Wood is Chairman, *and to bring with you* all books, ledgers, records and papers . . ." (F. R. 97).

The mandate to produce documents was addressed to the Sergeant-at-Arms or his special messenger and *not* to the respondents.

** The offense charged here is that of contempt allegedly committed before the House Committee on April 4, 1946 (F. R. 5). The position of the Government, maintained throughout its brief, that the only question presented here is whether the respondents produced documents, is not entirely accurate. The Trial Court by instructions to the Jury in *Fleischman* (F. R. 286) placed before it the question of respondent's having aided and abetted others (or another) to commit the offense. (Whether this alleged aiding or abetting consisted in part or in whole of respondents' actions before the Committee need not be the subject of speculation. The question of aiding and abetting was presented to the jury as was the respondents' testimony before the Committee.) This conduct could have status only if the Committee was properly constituted. The Court's ruling that it was relevant is error unless a quorum was present. Thus, whether the offense of respondents be viewed as an alleged contempt or

To the novel doctrine of anticipatory contempt advanced by the Government (Brief, p. 15), there are strong answers. To begin with, neither Fleischman nor Bryan announced any intention to defy the alleged subpoena for April 4. In the second place, even if they had announced any such intention they might well have changed their minds. To excuse the Committee from sitting because of a pre-hearing declaration of intent to commit an offense without actually having the offense committed is to recognize a doctrine of anticipatory contempt, which is unknown and repugnant to our concept of criminal justice.

A person who proclaims his intended disobedience of a Congressional subpoena may not be held in contempt unless and until he fails to comply with the subpoena and a threat to refuse to testify before a committee, no matter how widely publicized or how strongly proclaimed, is not contempt until a proper subpoena has been served and the witness has failed to appear before the committee as required. Surely a witness may not be held in contempt if, after being served with a subpoena but before the time for compliance, the committee recess indefinitely or is dissolved. And if one or both of the respondents had proclaimed in New York their intent to disobey the subpoena, in the presence of many witnesses, but then actually appeared in Washington before the House Committee at the time and place called for in the subpoena, they could not be in contempt. At the very least a *locus poenitentiae* must be offered them.

In any event, the necessity for a quorum, rather than being a "futile and time-consuming gesture" as suggested in the Government's brief (p. 15), is required by Congres-

as aiding and abetting a contempt which occurred on April 4, the Government has failed to prove its case unless the alleged refusals on April 4th to produce the summoned books and records constituted the crime of contempt (or unless respondent Fleischman aided some other witness before a properly constituted Committee who were in contempt thereof on April 4) (*Yonkichi Ito* v. *United States*, 64 F. (2d) 73, *cert. den.*, 289 U. S. 762; *Morgan* v. *United States*, 159 F. (2d) 85; and see *United States* v. *Howitt*, 55 F. Supp. 372, 374, aff'd 150 F. (2d) 82 aff'd 328 U. S. 189).

sional enactment (Rule XI(2)(f) and Rule XV of the House of Representatives, Legislative Reorganization Act of 1946, 60 Stat. 812, § 133(d) and see *Christoffel* v. *United States, supra*).

The contention that "The demand for documents could be satisfied merely by turning them over to the Clerk of the Committee, regardless of whether the Committee was in fact sitting at the moment" (Brief for the United States, p. 16), even if it be assumed that a Congressional Committee could delegate its powers and, indeed, its status to its clerk, is not here relevant. The purported subpoena was not returnable before the Clerk. The respondents were to be summoned by the Sergeant-at-Arms or his special messenger "to be and appear before the un-American Activities Committee" (F. R. 97) and not the Clerk of said Committee. Moreover, as has been pointed out hereinabove (see footnote, p. 15), the purported subpoena was directed to the Sergeant-at-Arms ("to bring with *you* all books, ledgers . . .") and not the respondents. Compliance with the purported subpoena could not be achieved either by the Sergeant-at-Arms or the respondents "merely by turning them over to the Clerk of the Committee".

Blair v. *United States,* 250 U. S. 273, 282, cited by the Government (Brief for United States, p. 15) is hardly persuasive. There the witness did not challenge the organization, existence, or competence of the Grand Jury; he raised constitutional questions relating to the jurisdiction of a Federal Grand Jury. This Court ruled he had no right to make this challenge provided the Grand Jury "have a de facto existence and organization" (*Blair* v. *United States,* 250 U. S. 273, 282). Had the challenge been to the organization of the Grand Jury,—had there been no quorum —the witness could have made the challenge by the familiar remedy of mandamus. Had there been no quorum of the Grand Jury, then, on mandamus, the action of the Grand Jury could have been stopped because in fact that is the

rule in respect to Grand Juries.* In the cases at bar a challenge to the organization of the agency of government cannot be advanced by the device of mandamus. There is no other agency of government, the mandate of which can supervise or control the affairs of a Congressional Committee.

From all of the foregoing, it is apparent why the majority in the Court of Appeals below ruled that "appellant, summoned to produce records before the Congressional Committee could not comply with the summons unless the Committee met. Production before some members of the Committee, absent a quorum, would not be a compliance. So much is clear and undisputed. Unless the appellee could comply with the summons she could not be guilty of wilfully making default. Failure to do what could not be done is not a wilful crime. Neither is failure, however expressed, to desire and attempt it. The appellant could not be guilty of anything more than this unless the Congressional Committee met." *Fleischman* v. *United States,* 174 F. 2d 519, 520.

B.

It Was Neither Necessary Nor Possible For The Respondents To Raise The Point Of Lack Of Quorum At The Time Of The Offense.

The Brief for the United States argues (at p. 18, *et seq.*) that because no point of lack of quorum was raised by the respondents or by a member of the House Committee

*"No evidence can be taken unless at least sixteen are present. It is important that the Secretary keep a record at each session of the number of Grand Jurors in attendance and the number voting on a Bill, and preserve his records in case a question arises as to whether a prerequisite number, to wit, sixteen were in attendance, * * * If only sixteen Grand Jurors are present and one leaves the room, taking of evidence must be suspended until his return. The Foreman may temporarily excuse a member, provided the number remaining in attendance shall be at least sixteen." *Handbook for Federal Grand Jurors, Southern District of New York,* issued by Federal Grand Jury Association for the Southern District of New York, Second Edition 1939, p. 7.

at the time of the hearing, the point may not be raised at any time subsequent.

This view is in diametric opposition to the recent ruling of this Court in *Christoffel* v. *United States*. The same contention is made now by the United States as was made then (see Brief of United States in *Christoffel* v. *United States*, p. 16, *et seq.*, especially at p. 23). In the latter case it was demonstrated that under the rules of the House of Representatives and in compliance with Section 310 of Jefferson's Manual, Rules on Manual of the United States House of Representatives 1947, only a member of a Committee had the right to raise the point of no quorum. This Court has decided that "the power to raise a point of no quorum appears to be limited to members of the Committee" (*Christoffel* v. *United States*, 338 U. S. 84, 88). As a consequence it has been determined that "in a criminal case affecting the rights of one not a member, the occasion of trial is an appropriate one . . . to raise the question".

Moreover, the Brief of the United States herein states that "though respondents had the benefit of advice of counsel prior to the hearing . . . at no time was any suggestion made by them, by any other witnesses, or by their counsel that a quorum was not present" (Brief for the United States, p. 19). The plain fact is that though the respondents may have had the benefit of advice of counsel *prior* to the hearing, the record is clear that counsel was not permitted to attend upon the hearing (F. R. 146) and the argument heretofore expressed indicates that the advice of counsel would have been rendered academic in any event. For as this Court has said: "Witness in Committee hearings cannot be required to be familiar with the complications of parliamentary practice" (*Christoffel* v. *United States*, 338 U. S. 84, 88). Witnesses are not usually informed of the number of members on a particular Congressional Committee, nor are they able to keep a perpetual

inventory of those present or to distinguish between those present in the capacity of Congressmen and those present in the capacity of clerks and attendants. In addition, citizens generally are not aware of the proportion of a Committee necessary to establish a quorum.

The rule of *Carman* v. *Emerson*, 71 Fed. 264, 267, alluded to in the Brief for the United States (at page 20), is hardly applicable here. The excerpt quoted from that decision reveals the factors which distinguish the cited case from the instant ones. In the cited case the offending party failed to attend at all and the excuse for not attending had nothing to do with the constitution of the body requiring his attendance, but had to do rather with the personal situation which reportedly exempted the witness from attending.

The United States commends the statements of Mr. Justice JACKSON in his dissenting opinion in *Christoffel* as a guide to the disposition of these causes. It is clear from the excerpt of Mr. Justice JACKSON's remarks that his concern was with an attack on Congressional rules, practices and records by subsequent oral testimony; his expressed fear was that duly enrolled legislation might in this fashion be invalidated. Even in *Christoffel* the petitioner did not assert an argument which would permit invalidation of duly enrolled legislation and the decision of this Court in *Christoffel* has no such effect.

In any event, there is no question, in these causes, that subsequent oral testimony was received to challenge the validity of Committee records. In *Christoffel* there were some documentary records evidencing the attendance of a quorum of the Congressional Committee. Here the transcript reveals no Committee journal, no tally slips and no attendance record. The sole evidence submitted by the Government in support of the attendance of a quorum was itself subsequent oral testimony. Under the circumstances

the Government and this Court need show no concern for or encourage a reversal of the rule recently established in *Christoffel*. In the first place, as indicated, the fears of Mr. Justice JACKSON that the rule would lead to the invalidation of duly enrolled legislation are unreal; and in the second place, these causes hardly afford the opportunity to overrule *Christoffel* for that problem is not presented by the record below (as there were no official records of the Committee to be challenged here).

POINT II

The judgment of the Court of Appeals should be affirmed for additional reasons not passed upon by the Court of Appeals.

In reversing the judgments of the Trial Court herein the Court of Appeals for the District Court of Columbia Circuit found it unnecessary to reach other questions of equal importance. "We need not consider the questions raised in the *Barsky* case or whether Government employees were qualified jurors" (*Fleischman* v. *United States*, 174 F. 2d 519, 521). Thus a review of important questions was by-passed.

Now comes the United States and presents only the quorum question to this Court for its determination. Though no reversal of the Court of Appeals is anticipated, it is deemed important to note that were such a reversal to occur, the respondents would have been denied an opportunity for review of other important issues.*

* This would eventuate unless any reversal herein was accompanied by a mandate to the Court of Appeals to reconsider the appeals herein with respect to the issues not previously considered. These issues include the effect of the presence of Government employees on the Jury, the effect of receiving in evidence statements of respondents made before the House Committee, the error in charging as to the definition of the term "wilful" as that word is used in 2 U. S. C. 192, the error in the charge with respect to aiding and abetting and the error in respect to the charge on "custody and control".

Rule 38(2) of the Supreme Court states in part "only the questions specifically brought forward by the petition for a writ of certiorari will be considered." See *Flournoy* v. *Wiener*, 321 U. S. 253; *National Licorice Company* v. *National Labor Relations Board*, 309 U. S. 350. This rule does not bar consideration of the important issues hereinabove referred to, for the reason that, as construed by this Court, its applicability is limited to questions raised by the petitioner rather than by the respondent. As long as the respondent does not attack the validity of the decision below, any question raised by the pleadings or record or which have been argued in inferior courts, may be presented to this Court, even in the absence of a cross-petition for certiorari. *Walling* v. *Central Industries Co.*, 330 U. S. 545, 547; *Langnes* v. *Green*, 282 U. S. 531, 538; *Public Service Commission* v. *Havemeyer*, 296 U. S. 506, 509; *Cole* v. *Ralph*, 252 U. S. 286, *Letulle* v. *Scofield*, 308 U. S. 415, 421. For these reasons additional questions are argued herein.

A.

The Trial Courts Committed Reversible Errors In Refusing Respondents' Requests To Discharge All Government Employees From The Jury; This Error Was Not Reviewed By The Court Of Appeals.

At the beginning of the trials in each of the causes below the respondents moved to exclude all Government employees from the Jury (F. R. 17 *et seq.*; B. R. 27) and in each instance this motion was denied (F. R. 32; B. R. 28-29). In both causes, the respondents having exhausted their peremptory challenges, Government employees, including Army and Navy personnel (F. R. 38, 71; B. R. 27, 28), sat upon the Jury which convicted.

It was apparent to the Trial Court and to prospective jurors as well when the cases were identified by the gov-

ernment attorney (F. R. 33 *et seq.*) that the indictments obliged a trial of issues that were at once delicate and volatile. The respondents were charged with having committed contempts of a Congressional Committee and it was public knowledge that the particular Committee (on Un-American Activities) was on the search for and engaged in an effort to expose so-called subversive activities. It was equally apparent that the respondents were associated with an organization listed by the Attorney General as "subversive" (pursuant to Executive Order No. 9835, popularly referred to as the "Loyalty Order").

It was particularly known to civil servants that sympathetic association with or approval of ideas advanced by organizations thus listed was enough to taint the loyalty status of such employees and influence their continued employment by the Government.

It does not need extended argument to demonstrate that a government employee serving on a Jury in an adversary criminal proceeding, where the Government was more than the nominal representative of the public and where the charge was contempt of Congress, would find extreme difficulty in holding against the Government.

The question here presented to this Court is currently of the utmost importance. It has been presented to this Court before* and is before this Court now.**

The instant prosecutions present this question in its most refined form for these cases involve a conflict between a Committee of Congress, which played a large role in formulating and administering the so-called loyalty program and an organization which had come under its scrutiny. Indeed, the conflict is between an organization listed by the United States as subversive to it and the

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* In *Crawford* v. *United States*, 212 U. S. 183; *United States* v. *Wood*, 299 U. S. 123 and *Frazier* v. *United States*, 335 U. S. 97.

** In *Dennis* v. *United States*, October Term 1949 No. 436.

United States itself. In this conflict one of the parties, the United States, was represented on the Jury by employees whose loyalties were the object of its concern. When the trials herein were completed, a case involving an accused organization and the Government was left to a Jury whose members included employees of one of the parties. Under the circumstances the Jury did not have the politically dehydrated issue which the Government has heretofore contended was left to it (see Brief for the United States in the Court of Appeals for the District of Columbia Circuit, pages 8, 10-11, 13 and 14). The Government employee jurors were not only passing judgment in a case in which their employer was a party, but they were asked to determine innocence or guilt in a situation where the Government employee juror must necessarily pay heed to the risk that his decision might affect his own loyalty status.

Crawford v. *United States*, 212 U. S. 183, iterates the venerable rule which would disqualify a juror for cause if he is an employee of one of the parties (and see *Francone* v. *Southern Pac. Co.*, 145 F. 2d 732, 733). While it is true that a Government employee is not disqualified from serving as a juror in criminal cases where the United States is only the nominal plaintiff, on the complaint of a private person or corporation (*United States* v. *Wood*, 299 U. S. 123), it has become clearer in recent years that where the United States is more than the nominal plaintiff,—where the United States is really the complainant—a Jury, numbering amongst its members a Government employee is a defective Jury. *United States* v. *Wood, supra*, decided in 1937, pointed the way while upholding the right of Government employees to sit in judgment in some kinds of criminal cases. Prior to *United States* v. *Wood*, the state of the law was such that it probably was "a settled rule . . . that the mere fact of Governmental employment, unrelated to the particular issues or circumstances of a criminal

prosecution, created an absolute disqualification to serve as a juror in a criminal case". But the opinion of the Chief Justice of the United States in the *Wood* case terminated this absolute disqualification and suggested that the disqualification would come about only where the employment of the juror by the United States was related to the particular issues or circumstances of the prosecution. Thus, the Chief Justice stated "it is suggested that an employee of the Government may be apprehensive of the termination of his employment in case he decides in favor of the accused in a criminal case. Unless the suggestion be taken to have reference to some special and exceptional case, it seems to us far-fetched and chimerical." *United States* v. *Wood*, 299 U. S. 123, 150. The guide then is that in a "special and exceptional" case a Government employee must be disqualified. The inquiry remains as to what is such a special and exceptional case.

Frazier v. *United States*, 335 U. S. 97, is helpful to this inquiry.

In determining when there is at hand such a case as would infringe upon the protection afforded by the Sixth Amendment to the Constitution, it is clear that "the Constitution lays down no particular tests and procedure is not chained to an ancient and artificial formula". In each case "a broad discretion and duty reside in the Court to see that the Jury as finally selected is subject to no solid basis of objection on the score of impartiality, even though that basis might possibly arise through the working of chance or other lawful factors wholly within the framework of proper procedures for selecting the panel and choosing the jury from it." *Frazier* v. *United States*, 335 U. S. 97.

The four dissenting Justices of this Court in the *Frazier* case, speaking through Mr. Justice JACKSON, have eloquently proclaimed the manner in which the constitutional protections of the Sixth Amendment were destroyed

below. For it is clear that in the trial of these causes the United States "at the same time that it made its plea to [the Jury] to convict . . . had the upper hand of [some] of them in matters such as pay and promotion".

"Of late years, the Government is using its power as never before to pry into their lives and thoughts upon the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. A government employee cannot today be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record is, if only a little, at stake in every such prosecution. And prosecutors seldom fail to stress, if not to exaggerate, the importance of the case before them to the whole social, if not the cosmic, order. Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger in the great bureaucracy to feel so secure as to put his dependence on the Government wholly out of mind. I do not doubt that the government employees as a class possess a normal independence and fortitude. But we have grounds to assume also that the normal proportion of them are subject to that very human weakness, especially displayed in Washington, which leads men to '. . . crook the pregnant hinges of the knee where thrift may follow fawning.' So I reject as spurious any view that government employment differs from all other employment in creating no psychological pressure of dependency or interest in gaining favor, which might tend to predetermine issues in the interest of the party which has complete mastery over the juror's ambition and position. But even if this suspicion can be dismissed by the Court as a mere phantasy, it cannot deny that such a jury has a one-sided outlook on problems before it and an appearance of government leverage which is itself a blemish on the name of justice in the District of Columbia."

The duty of the Trial Court to insure such impartiality as is called for in *Frazier* was most manifest in those causes. Precisely to the extent that it permitted government employees to sit, to that extent was its duty violated. The evidence left to the jury involved a conflict between an organization listed as subversive and the government which had an awful power over those jurors employed by it. This jury, if not a 'packed' jury was certainly one that had "a one sided outlook on problems before it."

The "special and exceptional case" referred to in *United States* v. *Wood, supra,* clearly is that case where, as here, the employment of a juror by the United States was closely related to the particular issues or circumstances of the prosecution. Here is the prime example of the necessity of imputing bias as a class to Government employee jurors.

Moreover, this is the kind of bias which can never be discovered or cured on the *voir dire.* It is of no aid whatsoever, in gathering an impartial jury, to have the assurance of a Government employee that he is not biased. Unless the jury panel in these cases was composed of an extraordinarily courageous group of employees, a matter upon which respondents should not be required to speculate, the failure of any government employee on the panel* to state or appreciate the "psychological pressure of dependency or interest in gaining favor, which might tend to predetermine issues in the interest of the party which has complete mastery over the juror's ambition and position" *Frazier* v. *United States,* 93 L. Ed. 175, 185) suggests that the Trial Judge did not—and could not—upon the *voir dire* achieve an unbiased and impartial jury. Government employees on the jury panel in this case should have been disqualified without engaging in the futile enterprise of

* While a substantial portion of the jury panel in these causes consisted of government employees none of those employees professed any bias in favor of their employer and the superveillor of their loyalty, the United States Government.

ascertaining the minds and atitudes of those employees by means of the general, abstract questions employed upon the *voir dire.*

It is respondents' position that wherever a Government employee may *plausibly* construe the issue in a prosecution as one involving the loyalty of the defendant and, therefore, may *plausibly* conclude that his decision as a juror might be deemed a manifestation of his own loyalty as a Government employee, he should not be permitted to sit as a juror. If a juror can *plausibly* consider that his status as a "loyal American" is in the balance when he casts his vote as a juror, he is no longer free to decide the case before him exclusively upon the facts and the law.

Such a situation prevailed in this case and it is this situation which brings the case within the "special and exceptional" category referred to in the *Wood* decision. It was, therefore, prejudicial error to deny respondents' motions to dismiss Government employees from the Jury.

B.

It Was Reversible Error To Admit The Testimony Of Respondents Before The House Committee In Evidence.

Over objection of respondents (F. R. 116; B. R. 33), based upon the express and explicit statutory provision that testimony before a Congressional Committee may not be used against witnesses in subsequent criminal proceedings (18 U. S. C. § 3486), the Trial Court permitted the Government to read to the Jury testimony by the respondents before the House Committee (F. R. 123, *et seq.*; B. R. 33 *et seq.*).

The authorities are clear that testimony such as that dealt with by Section 3486 may not be admitted into evidence in a prosecution for perjury (*Cameron* v. *United*

States, 231 U. S. 710, 721) or contempt (*Wakefield* v. *Housel*, 288 F. 721; *In re Haley*, 41 F. 2d 379) where the giving of the testimony does not itself constitute the crime charged. "The crucial question, it seems, is whether the act which constitutes the offense is one disclosed by the testimony or whether it is the testimony itself" (Note, 15 *U. of Chic. L. R.* 442, 443); where the testimony is the crime it is admissible, otherwise it is not.

The foregoing formulation stems from the balancing of individual constitutional rights and the needs of effective government.

The exclusionary rule provided by Section 3486 is derived from the constitutional privilege against self-incrimination. Of necessity, therefore, though it is intended to aid the government by encouraging witness to testify without fear of criminal sanctions, it imposes a restraint and a burden upon the government in its prosecutions. The United States cannot be heard to argue that Section 3486 should be disregarded because it imposes such a restraint and such a burden. Moreover, since the respondents could not have been compelled to testify over a claim of privilege (*Counselman* v. *Hitchcock*, 142 U. S. 547; *United States* v. *De Lorenzo*, 151 F. 2d 122, 124; *United States* v. *Barsky*, 72 F. Supp. 165, 167), a loose construction at this time of the rights of respondents under this section would amount to entrapment (*United States* v. *Monia*, 317 U. S. 424).

On the other hand, it may be that Section 3486 does not permit crimes inherent in or committed by the actual testimony to go unpunished. Thus, whether by express provisions or by statutory construction, perjurious testimony may be admitted in a perjury prosecution based upon that testimony where the defendant invokes an exclusionary statute such as Section 3486. *Glickstein* v. *United States*, 222 U. S. 139; *Edelstein* v. *United States*, 149 F. 636. And in that rare situation where the testimony itself is the con-

tempt for which the witness is prosecuted, perhaps the testimony may be allowed. But beyond these exceptions, beyond permitting the Government to introduce the testimony which is itself the charged offense and, therefore, indispensable, if the offense is not to be unpunishable, the needs of the prosecutor may not be preferred to the constitutional rights and privileges of witnesses.

> "History denies that these restraints defeat the end of justice by crippling the prosecution and discouraging the detection of crime and the conviction of criminals. All they do defeat are the lazy habits of those police who prefer to use a whip rather than their wits to solve a mystery." Mr. Justice DOUGLAS, "Procedural Safeguards in the Bill of Rights," 31 *Journal of Amer. Jud. Society* 166, 168 (1948).

Accordingly, where, as here, the testimony offered is not the crime but offered only as an item of proof thereof, it was error to permit the testimony to go before the jury.

C.

The Charge Of The Trial Court As To The Meaning Of The Term "Willful" As Used In 2 U. S. C. 192 Was Error.

In both causes the charge to the Jury defined the term willful as "deliberate and intentional" (F. R. 286; B. R. 61). In both causes the charge to the Jury on this subject stated "the motive of the defendant in failing to comply with the subpoena and her reason for such failure are not material so long as you find that she did so intentionally and deliberately" (F. R. 286; B. R. 61).

These charges as to the meaning of "willful" are in error. As the reversal of the convictions herein were predicated on other grounds, this error was not considered by the Court of Appeals.

The charges on "willful" referred to are in evident conflict with applicable decisions of this Court insofar as they make proof of a specific criminal intent unnecessary. In prosecutions of the character of the instant ones, a specific criminal intent is an essential element of the crime. (*Screws* v. *U. S.*, 325 U. S. 91; *Hartzell* v. *United States*, 332 U. S. 680.) Insofar as the respondents conducted themselves at the time of the hearing before the House Committee in reliance upon advice of counsel and upon the honest and reasonable belief that the resolution creating the House Committee was unconstitutional or, in the alternative, that custody and control of documents was not with the respondent, it is apparent they had no specific intent to commit a "wilful default." (See *Keegan* v. *United States*, 325 U. S. 478; *United States* v. *Murdock*, 290 U. S. 389.)

D.

The Charge Of The Court In The Fleischman Case On The Subject Of Aiding and Abetting Was Error.

In view of the fact that Count 1 of the indictment against Ernestina G. Fleischman was dismissed in advance of the jury deliberation (F. R. 291) and in view of the further fact that Count 2 of the indictment on which the respondent was found guilty makes no reference to any crime except that of making wilful default (as a principal), the charge of the Court to the effect that "it is the law . . . if one person aids or abets, advises or counsels or encourages another to commit an offense, he is equally liable under the criminal law with the one who physically commits it" (F. R. 286), was error.

Quite apart from the fact that for the first time there was introduced into the trial the charge of aiding and abetting a contempt rather than committing it as a princi-

pal, (so that the respondent was not advised and could offer no proof as to the time of the aiding, the principal who was aided, or the place at which the aiding and abetting occurred), this charge is error because it is predicated on a situation where there was no proof either that there was a principal or that the alleged accessory did anything to aid or abet.

While it is true that the government showed some participation by the respondent Fleischman in the general activities of JAFRC, it is clear that it failed to prove that she was engaged in any Executive Board activity pertaining in any way to the production of the particular documents sought. For example, no evidence was adduced to indicate her presence on December 14, 1945 when the Executive Board, by resolution, acted so as to give instructions to the respondent Bryan on this problem (F. R. 242). Nor was it shown that she voted for, approved or ratified that resolution. On the contrary, it affirmatively appears that the respondent Fleischman was not present and did not vote at the meeting of the Executive Board which took place on February 11, 1945 and which by resolution instructed Dr. Barsky not to produce the summoned records (F. R. 219, 243-4). Indeed, it is clear that no witness placed the respondent Fleischman at *any* meeting of the Executive Board of JAFRC when said Board took action pertaining to the summoned records (F. R. 192, 200, 207, 210, 211, 212, 219, 228, 232). In addition the record affirmatively shows that no one saw or placed the respondent Fleischman at the offices of the JAFRC's attorney in connection with the statement she submitted or, indeed, in any connection (F. R. 209, 212).

In view of all of the foregoing there are persuasive reasons to support the opinion of EDGERTON, *J.* insofar as that opinion concluded that the Trial Court should have directed a verdict of acquittal (*Fleischman* v. *United States*, 174 F. 2d 519, 521).

In any event, whether the offense of respondent be viewed as an alleged contempt or aiding and abetting a contempt, the Government failed to prove its case, unless it proved that the respondent by what she did before the Committee (assuming a quorum of the Committee was present), aided and abetted another to commit a contempt before a properly constituted Committee. It nowhere appearing that others committed a contempt, the respondent would not have been one who aided or abetted such a contempt.*

E.

It Was Error For The Trial Court To Rule That Respondent Fleischman Was Obliged To Comply With The Alleged Subpoena *Duces Tecum* If She Alone Or With Others Had Custody Or Dominion And Control Of The Subpoenaed Books And Records.

At the conclusion of the Government's case the respondent Ernestina G. Fleischman moved for an acquittal upon the ground, among others, that the Government had not proven that she had custody of the subpoenaed books and records (F. R. 256, 257). This motion was denied (F. R. 279). At the conclusion of the trial the court charged the jury that the respondent Fleischman was required to comply with the alleged subpoena *duces tecum* and should be found guilty of contempt for non-compliance if the jury determined

> "3. That the defendant, alone or in concert with one or more of the defendants, had custody or dominion and control over such records" (F. R. 286).

Respondent Fleischman objected to this part of the charge, among others (F. R. 290).

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* (*Yenkichi, Ito* v. *United States*, 64 F. 2d 73, *cert. den.*, 289 U. S. 762; *Morgan* v. *United States*, 159 F. (2d) 85; and see *United States* v. *Howitt*, 55 F. Supp. 372, 374 aff'd 150 F. (2d) 82 aff'd 328 U. S. 189.)

The court's charge is based upon a theory which extends a person's responsibility under a subpoena *duces tecum* to a point never previously reached by any court.

The courts have consistently held that a subpoena *duces tecum* need be complied with only where actual custody is had of the documents requested; a party thus subpoenaed need not "sue and labor" to obtain books and records he does not possess. *Amey* v. *Long*, 9 East 473 (K. B. 1808); *Munroe* v. *United States*, 216 Fed. 107; *In re Ironclad Mfg. Co.*, 201 Fed. 66; *United States* v. *American Tobacco Co.*, 146 Fed. 557; *In re Sykes*, 23 Fed. Cas. 13, 707; *Russell* v. *McLellan*, 21 Fed. Cas. 12, 158; *In re Harris*, 27 F. Supp. 480; *Commonwealth* v. *International Harvester Co.*, 148 Ky. 37.

The dictum of this Court in *Wilson* v. *United States*, 221 U. S. 361, 374, 376, to the effect that a subpoena *duces tecum* addressed to a corporation is "a command to those who are officially responsible for the conduct of its affairs", should not be extended to members of an unincorporated association or to a process which issues *ex parte* such as a subpoena *duces tecum*. Cf. *Commissioners* v. *Sellew*, 99 U. S. 624. In the *Wilson* case the subpoena was addressed to the organization and any individual responsibility flowing therefrom was created by virtue of the individual's position in the organization. In the instant case, however, the subpoena was addressed to the respondent as an individual and the only responsibility that can flow therefrom is that which normally flows from a subpoena *duces tecum* addressed to an individual. We have found no case of a subpoena directed to a corporation or an unincorporated association where any person has been held responsible for producing records not in his custody. Indeed, this Court in *Brown* v. *United States*, 276 U. S. 134, 142, said:

> "While the subpoena duces tecum directed to the officer in possession of the documents would have

been good, and perhaps preferable, the matter is not one of substance, but purely of procedure, and we entertain no doubt that the subpoena here directed to the association and *served on such officer is valid.*" (Italics added.)

It will be noted that the Court sustained the validity of a subpoena directed to an association only when served on "such officer", *i. e.*, the officer in possession of the documents.

Were the rule any broader than as has been stated, confusion would result in a field in which the law has been clear. The door would be open to the service of subpoenas not only upon the executive officers of the corporation who have custody of the books, but on the directors of such corporations, and even on the stockholders. The subpoena would be a means to compel the holding of meetings of boards of directors, or meetings of the stockholders of corporations, to secure the removal of any custodian who challenges the validity of a subpoena.

As applied to unincorporated associations, not only governing board members, but also individual members of clubs, associations and unions, would be subject to subpoena to compel them to call meetings to require custodians of records to produce the records or transfer them to other custodians willing to produce. Such an unwarranted expansion of the scope of the subpoena would create a precedent substituting "shotgun" techniques into a field heretofore clearly and simply understood.

POINT III

The judgments of conviction were properly reversed by the Court of Appeals for the District of Columbia in that the Resolution upon which the aforesaid convictions are ultimately premised is on its face and as applied unconstitutional.

These causes are pregnant with other important issues, the constitutionality of the resolution establishing the House Committee on un-American Activities and the abuse by the Committee of its powers under said resolution. Except in this court's discretion, argument on these issues may not be properly made for the reason that such argument is, in a strict sense, an attack on the judgment of the Court of Appeals which ordered a new trial and not a dismissal. However, inasmuch as these issues are presently pending before this Court in *Barsky* v. *United States, cert. den.*, 334 U. S. 843 (Petition for rehearing pending) and inasmuch as these issues will be or have been presented to this Court in *Lawson* v. *United States* and *Trumbo* v. *United States*, October Term 1948, No. 334, and in view of the power of this Court in its discretion to consider such an argument (*Langnes* v. *Green*, *supra*, p. 22), these issues are developed for such consideration as this Court may wish to give them.

Upon the Petition for Writ of Certiorari in the companion *Barsky* case and in the Petition for Rehearing and the Supplemental Briefs in Support of the Petition for Rehearing in *Barsky*, there have been submitted to this Court complete and extensive arguments demonstrating that the Resolution pursuant to which the House Committee on Un-American Activities acted herein violates the First, Fifth, Sixth, Ninth and Tenth Amendments to the United States Constitution. The arguments and au-

thorities cited in those briefs are applicable to the instant causes and this Court is respectfully referred to those briefs for a full statement of respondents' position concerning the constitutionality of the Resolution. In view, however, of the importance of the question of the constitutionality of the Resolution and the circumstance that this Court to date has not ruled upon the question, respondents briefly restate and summarize at this point for the consideration of the Court the reasons for their position that the Resolution on its face and as applied is violative of fundamental constitutional inhibitions contained in the Bill of Rights.

The experience of the House Committee on Un-American Activities over the course of approximately a decade and a half removes any doubt that that Committee and the Resolution under which it operates abridges freedom of thought, speech, press and assembly. This is accomplished by the use of compulsory process whereby witnesses are required to attend at Committee hearings and answer inquiries concerning their political beliefs, expressions, activities and associations; and by means of public dissemination by the Committee and its members of judgments concerning the "Americanism", "loyalty" or political orthodoxy of those persons under investigation. The technique of harrowing investigation and defamatory public judgments has proven in practice to constitute a most effective restraint and abridgment of First Amendment rights. Those persons investigated and "exposed" are plainly punished for activities and beliefs clearly within the protective confines of the First Amendment; and as the prohibitions of the First Amendment extend to subsequent punishment as well as prior restraints (*Thornhill* v. *Alabama*, 310 U. S. 88, 101, 102), punishment of the unhappy quarry of a House Committee investigation for prior political beliefs and affiliations may be considered an abridgment of First Amendment rights. Even more effective, however,

is the fashion in which the Resolution and the House Committee have imposed a prior restraint upon thought and expression. Motion picture producers fearful of the consequences of a hostile investigation and report by the House Committee on Un-American Activities have expressly stated their intention to select employees and produce films in accordance with the standards of political and social orthodoxy prescribed by the House Committee.* The restraint thus made explicit in the instance of motion picture producers has been implicit and immeasurable in the case of the radio, the press, and our schools—each of which institutions has had the benefit of the attention of the House Committee at different times (see H. R. 2233, 79th Cong., 2d Sess.; Gellerman, *Martin Dies* (1944) ch. 7; Note, 47 *Columbia Law Rev.* 416). Every major media of the dissemination of ideas and information has been the subject of investigation and, therefore, restraint by the House Committee which asks this Court to condone and implement its practices in the instant causes.

Nor is it to be supposed that the restraints and abridgment worked by the House Committee are either unauthorized or merely incidental to the Resolution. The terms of the Resolution are so broad, so vague, and so malleable to the whims and dictates of the personnel of the House Committee that no individual and no organization in this country may safely consider itself immune from the ubiquitous investigations of the House Committee. Indeed, the legislative history of the House Committee not only demonstrates that the scope of its activities has been ratified and authorized by the Congress by re-enacting the Resolution (83 Cong. Rec. 7567-7686; 84 Cong. Rec. 1098-1128; 86 Cong. Rec. 572-605; 87 Cong. Rec. 886-900; 88 Cong. Rec. 2282-2297; 89 Cong. Rec. 721-729, 795-810; 91 Cong. Rec.

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* See *Lawson* v. *United States*, Oct. Term 1948, No. 335, Joint Appendix 257-260, 312-316, 336-338, 480-545, and Petition for Certiorari at pp. 4-5; see also Kahn, *Hollywood on Trial*, *passim*.

10-14; 92 Cong. Rec. 7720-7728; 94 Cong. Rec. 2483-2496), but in addition "it may be said that Congress decided not to restrict the Committee by giving an explicit meaning to the authorizing enactments" (Note, 47 *Columbia Law Rev.* 416, 423).

As the Resolution on its face and as applied by the House Committee restrains and abridges First Amendment rights it would appear, at first glance, that the validity of that Resolution should be tested in terms of the "clear and present danger" standard to which this Court has continued to adhere as recently as the last Term. *Terminiello* v. *City of Chicago*, 337 U. S. 1. If that standard is here applicable, then the Resolution is plainly and concededly unconstitutional. For the majority opinion in *Barsky* failed to glean any clear and present danger in our nation which would justify the abridgments occasioned by the House Committee; instead, that opinion was predicated upon the existence of "some reasonable cause for concern" (167 F. 2d, 246). It is respondents' view that the Constitution permits no greater latitude in the abridgment of First Amendment rights by investigation and "exposure" than by other types of Congressional action. The need to investigate is no greater than the exigencies which underlie the exercise of the taxing power, the police power or, indeed, the power of national survival itself, yet each of the foregoing is delimited by the strictures of the First Amendment as realized in the "clear and present danger" test. *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Grosjean* v. *American Press Company*, 297 U. S. 233; *Lovell* v. *Griffin*, 303 U. S. 444; *Thornhill* v. *Alabama*, 310 U. S. 88; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293; *Bridges* v. *California*, 314 U. S. 252; *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665; *Bridges* v. *Wixon*, 326 U. S. 135; *Hartzel* v. *United States*, 322 U. S. 680; *Stromberg* v. *California*, 283 U. S. 359; *DeJonge* v. *Oregon*, 299 U. S. 353;

Herndon v. *Lowry*, 301 U. S. 242; *Taylor* v. *Mississippi*, 319 U. S. 583; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639. In any event, even in terms of the premise upon which the majority opinion in the *Barsky* case justified the investigation by the House Committee into the exercise of First Amendment rights, the conclusion does not follow that the Resolution is valid under the First Amendment.

For the history and the avowed purpose of the House Committee on Un-American Activities demonstrate that punishment by exposure and not legislation is its objective. See 94 Cong. Rec. 2495; Notes, 96 *U. of Penn. Law Rev.* 381, 396; 14 *U. of Chic. Law Rev.* 256, 259; 47 *Columbia Law Rev.* 416, 427; H. R. 2, 76th Cong., 1st Sess., p. 13; H. R. 1, 77th Cong., 1st Sess., p. 24; H. R. 2742, 79th Cong., 2nd Sess., p. 16.

The Basic defect in the Resolution is that it violates the First Amendment to the United States Constitution. But as the abridgment and suppression of free thought and expression required procedures violative of the most elementary notions of fair play during the Inquisition, and again during the late Fifteenth Century and early Sixteenth Century in England, and again during the New England witch-hunts of the Seventeenth Century, so has the House Committee found it impossible to accomplish its noxious efforts to destroy our freedoms without relying upon and employing procedures which do not and could not comport with the due process clause of the Fifth Amendment. Thus neither the Resolution establishing the House Committee nor any other related statute affords to witnesses before the House Committee or any other subject of the Committee's investigations any of the procedural safeguards which have been identified with due process of law: they are not entitled to the aid of counsel in the presence of the Committee; they are not entitled to examine the evidence against them; they are not entitled to cross-examine hostile

witnesses; they are not entitled to make an affirmative presentation of a defense to charges; and they are not entitled to limit the evidence presented to and disseminated by the Committee by the evidentiary rules against rumor, gossip, hearsay or biased testimony. In short, the Committee is authorized and does try and punish by public defamation individuals and organizations without affording those individuals or organizations any of the judicial or procedural safeguards implicit in due process of law; what Congress as a legislative body cannot do because of the prohibition against Bills of Attainer the House Committee has done. As the foregoing techniques of the House Committee lend themselves to abuses impinging upon First and Fifth Amendment rights it becomes particularly important that the scope of the investigatory power of the House Committee be precisely and definitively stated in the Resolution. The fact is, however, that the key terms of the Resolution are so broad and so nebulous that it constitutes a flagrant violation of the Fifth and Sixth Amendments to the United States Constitution.

The key term of the Resolution is "un-American propaganda activities". The opinions in the *Barsky* case indicate that the term "un-American" is vague and indefinite (167 F. 2d, 247; cf. *Feinglass* v. *Reinicke,* 48 Fed. Supp. 438). And this Court described as the term "subversive," another term used in the Resolution, as one of vague and uncertain content. *Winters* v. *New York,* 333 U. S. 507, 518. But the majority opinion in *Barsky* concluded that the Resolution was a valid delegation of power by the Congress to the House Committee since the instruction therein to investigate propaganda which "attacks the principle of the form of government as guaranteed by our Constitution" ". . . is definite enough . . ." (167 F. 2d, 247). This conclusion, however, does not dispose of respondents' contention that, irrespective of the sufficiency of the Resolution as a delegation of power, the Resolution, enforceable and here enforced by penal sanctions, is to be treated as a penal stat-

ute (*Kraus & Bros.* v. *United States*, 327 U. S. 614) and as a penal statute it violates the fifth and Sixth Amendments because its terms fail to provide the clear and definite standard of guilt required of such a statute. *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Cline* v. *Frank Dairy Co.*, 274 U. S. 445; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *United States* v. *Reese*, 92 U. S. 214.

Indeed, even the terms deemed by the Court of Appeals as "definite enough" failed to convey to this Court any clear or fixed meaning in *Schneiderman* v. *United States*, 320 U. S. 118.

Any definite meaning which might be attributed to the phrase "propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution" is vitiated since it qualifies and is inseparable from the concededly vague term, "un-American propaganda activities." And even if the phrase relied on is separable in import from the balance of the Resolution, the vagueness of the other terms is decisive. For it does not appear from the record or otherwise that the JAFRC was being investigated under the purportedly definite portion of the Resolution. Since the determination of pertinency by the Trial Court was general and not geared to that portion of the Resolution which the Court of Appeals found to be definite and, therefore, valid, "the conviction cannot be upheld" if, as the Court of Appeals conceded, other portions of the Resolution are vague and therefore "invalid under the Federal Constitution." *Stromberg* v. *California*, 283 U. S. 359, 368.

The Court of Appeals held in the *Barsky* case that the Resolution provided witnesses with an adequate standard of guilt in that "the question addressed to those appellants was pertinent to the subject . . . of the resolution" (167 F. 2d, 248). But when it is considered that the terms used in the Resolution have no fixed or definite meaning, then

it must be concluded that the Resolution violates the Fifth and Sixth Amendments in that it exposed respondents to criminal sanctions without providing respondents, in advance, with fixed and definite standards whereby respondents could ascertain what acts would constitute the crime of contempt. The subsequent judicial determinations that the demand by the House Committee upon respondents was pertinent does not supply the Resolution with the clearly defined standard of guilt to which respondents were constitutionally entitled in advance of their appearance before the House Committee. 26 Cong. Globe, 34th Cong., 3rd Sess., pp. 439, *et seq.;* 8 Wigmore, *Evidence* § 2195, p. 80 (3 ed. 1940); Gose, "The Limits of Congressional Investigating Power" 10 *Washington Law Rev.* 61, 138, 153; Note, 47 *Columbia Law Rev.* 416, 425. Consequently, irrespective of whether the crime charged is judicially determined to be clearly within the statute defining the crime, the Resolution "violates an accused's rights under procedural due process" since the Resolution fails "to give fair notice to what acts will be punished" (*Winters* v. *New York*, 333 U. S. 507, 509) to "men of common intelligence" (*Connally* v. *General Construction Co.*, 269 U. S. 385, 391).

Finally, it should be noted that this Court has heretofore defined and applied limits to the Congressional investigatory power. The limits as thus defined by this Court require the conclusion that the Resolution be declared invalid even apart from the considerations deriving from the First, Fifth and Sixth Amendments; the Resolution is invalid under the Ninth and Tenth Amendments to the United States Constitution in that it authorizes the exercise of power nowhere delegated to the Federal Government. This conclusion is reached upon a consideration of two controlling principles: on the one hand, this Court has recognized the basic constitutional right to the "exemption of [one's] private affairs, books, and papers from

the inspection and scrutiny of others." (*In Re Pacific Railway Commission*, 32 Fed. 241, 250 (FIELD, *J.*); *Kilbourn* v. *Thompson*, 103 U. S. 168; *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1); on the other hand, the Congress has the power to investigate into the affairs of individuals and organizations as an aid to the functions assigned to the Congress by the Constitution (*Marshall* v. *Gordon*, 243 U. S. 521, 541; *Sinclair* v. *United States*, 279 U. S. 263, 291; *McGrain* v. *Daugherty*, 273 U. S. 135, 173; *In re Chapman*, 166 U. S. 661, 667; *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613; *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376, 388). The pragmatic resolution of these two principles may be accomplished by limiting the subject of Congressional investigation to matters within the Congressional constitutional power. Thus the functions of the Congress which may be assisted by investigation include: control by the Congress of its members (Art. I, § 5, Cl. 1, 2); impeachment (Art. I, § 3, Cl. 6); the power to make the appropriations required for the administration of the laws (Art. I, § 7, Cl. 1); and the formulation of legislation (Art. I, § 8) and it is therefore appropriate for Congress to inquire into elections or corruption of legislators (*In re Chapman*, 166 U. S. 661; *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376; *Barry* v. *United States*, 279 U. S. 597) and into the affairs of public officials or departments to determine whether the laws are properly administered (*McGrain* v. *Daugherty*, 273 U. S. 135; *Sinclair* v. *United States*, 279 U. S. 263). But it is not appropriate for the Congress to investigate into the private affairs of private persons upon the basis of some remote, speculative, possibility that legislation may ensue therefrom. *Kilbourn* v. *Thompson*, 103 U. S. 168, is the only instance where this Court considered an investigation which had for its defined scope the private affairs of private citizens. It was there held that if the investigation is

such "that it could result in no valid legislation on the subject to which the inquiry referred," the investigation would be declared "void for want of jurisdiction in that body." *Kilbourn* v. *Thompson*, 103 U. S. 168, 193, 196. Such a void investigation was held to be without the constitutional grant of power to the Congress contained in Article I, Section 1 or Article I, Section 8, Clause 18 and therefore in derogation of the powers reserved to the people and to the States by the Ninth and Tenth Amendments.

The scope of the investigation authorized by the Resolution is an unlimited inquiry into the private affairs of private persons and the Resolution is therefore unconstitutional because it does not relate directly to prospective valid legislation. It is not sufficient that the investigation may result in some valid legislation wholly incommensurate with its scope. Eberling, *Congressional Investigations* (1928) 383. The investigation considered in *Kilbourn* v. *Thompson*, as any investigation, contained some possibility of future legislation. See Landis, "Constitutional Limits on the Congressional Power of Investigation," 40 *Harvard Law Rev.*, 153, 216-217. The right of security for the private affairs of private citizens prohibits an extensive Congressional inquiry into those matters on the slight pretext of a mere possibility of future legislation. The only legislation to which the House Committee investigation is plausibly related is legislation affecting political expression and opinion. The remarkable paucity of legislation produced by this Committee and its predecessors is indicative of what may be expected in the future. For that paucity of legislation is not due to any lack of diligence on the part of the House Committee; the real block is the Bill of Rights. The House Committee has repeatedly stated that the objective of the House Committee is not to produce legislation but to accomplish by publicity and "exposure" what it could not constitutionally accomplish by legislation. See

Note, 47 *Columbia Law Rev.*, 416, 427 n. 110. An investigation which, at best, abridges speech in an effort to determine whether and what speech may be abridged is in violation of the Ninth and Tenth Amendments. ——

CONCLUSION

For all of the foregoing reasons, the judgments reversing the convictions of respondents and ordering new trials should be affirmed.*

Respectfully submitted,

O. John Rogge,
Benedict Wolf,
Counsel for Respondents.

On the Brief:
Robert H. Goldman,
Murray A. Gordon,
Herbert J. Fabricant.